

Supreme Court, U. S.
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**IN THE
Supreme Court of the United States
OCTOBER TERM, 1977**

No. 77-827

DONALD J. WILSON, SR., *Petitioner,*
v.
UNITED STATES OF AMERICA, *Respondent.*

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
Third Circuit**

REPLY BRIEF FOR PETITIONER

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February, 1978.

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In its Memorandum in Opposition, the United States advances two contradictory arguments. First, it argues the trial court sufficiently instructed the jury regarding the necessity of finding deficiencies in income taxes owing by both petitioner and Mercer Tire Company. Although contradictory to its first argument, the government claims in Argument 2 "that the trial court correctly charged the jury that the only issue the jury

had to decide was that of willfulness or intent." (G.M. 4).¹ Obviously, the government's admission that the jury instruction was limited to a sole issue is in total contradiction to its earlier claim that the court properly instructed the jury on all issues including the necessity of finding tax deficiencies owing by petitioner and Mercer Tire Company.

Although petitioner assumes the government intended to present these as alternative positions, such a distinction is irrelevant since neither argument is supported by the record of this case. Petitioner believes the record and existing law clearly establish that an admission of mere receipt of funds by an individual does not constitute a concession that taxes are owing. Moreover, petitioner believes the trial judge's last minute attempt to cure a clearly defective charge was a meaningless and ineffective gesture since the jury obviously understood its inquiry to be limited to the sole question of willfulness.

In its Memorandum in Opposition, the government repeats its all too familiar theme that petitioner and his trial counsel conceded the existence of the requisite federal income tax deficiencies. As petitioner has argued on appeal, the government apparently treated this as another simple diversion of income situation involving a closely held corporation and its officer/shareholder. As a simple diversion case, the government believed there could be no meaningful dispute that the necessary deficiencies in income taxes existed. The government was so certain of this view that it

¹ "G.M." refers to Memorandum For The United States In Opposition. "P.A." refers to Appendix filed by the petitioner in the court of appeals. "Tr." refers to the trial transcript.

never even bothered to request an instruction on the existence of a deficiency in income tax despite the fact it knew this to be an essential element of the alleged offense for which it bore the burden of proof. (P.A. 4-6).

Moreover, the government alleges that petitioner's admission of receiving funds coupled with his trial counsel's acknowledgement that some taxes were owing (by petitioner or Mercer Tire Company or *perhaps* both) constituted a concession of the tax deficiency element of the alleged crime. Unfortunately for the government, petitioner's admission that he received the funds in question did not establish a deficiency in income tax in either law or fact. Furthermore, no concession of this necessary element was intended. It remained the government's burden to establish that petitioner while acting on behalf of Mercer Tire received the questioned funds and then subsequently diverted them for his own personal use, benefit and enjoyment. Petitioner testified that he received and expended the funds on behalf of Mercer Tire Company. (P.A. 47-65). If his testimony was believed by the jury, it could not find him guilty of personal income tax evasion. Without a corporate diversion, the government could not prove that petitioner had taxable income which was omitted from his tax return and for which no federal income taxes were paid.

Although the capacity in which petitioner was acting when he admittedly received and expended the questioned funds might appear at first blush to be a subtle distinction created by overly complex tax laws, this technical tax distinction was injected into the case when the government sought an indictment and ulti-

mately prosecuted petitioner for actions occurring in both his capacities as an officer/shareholder of Mercer Tire Company and as an individual citizen taxpayer. Having injected technical tax considerations into its prosecution of petitioner, the government should not be permitted to hide behind an admission of mere receipt of funds by petitioner as a concession of an essential element of the alleged offenses. No matter how logically appealing it may at first blush appear, mere receipt does not constitute diversion and necessitate recognition of taxable income. Petitioner offered a plausible defense to the recognition of taxable income component and the consequent underpayment of tax component of the personal tax evasion offense. Absent a concession, the government's burden with respect to establishing tax deficiencies owing by petitioner and his spouse remained. Moreover, it remained the trial court's duty to instruct the jury on this essential element.

Petitioner believes the record in this case clearly establishes that the trial court limited the jury's consideration of petitioner's guilt or innocence to whether it believed his actions were willful. On four separate occasions during the primary charge, the court instructed the jury that the sole issue for its consideration was the existence of willfulness or the lack thereof. (P.A. 79, 85, 87, 88, 89). It was only after objections to the primary charge were considered, that the court instructed the jury regarding the necessity of finding some substantial evasion of taxes. (P.A. 101-102). This last minute attempt to cure the charge, however, was ineffective for a number of reasons. First, the court failed to instruct the jury regarding what constituted taxable income or how the necessary

underpayment of tax could be determined. Second, the court failed to instruct the jury regarding the necessity of finding a diversion of funds by petitioner from Mercer Tire Company. Finally, both before and after the reference to the necessity of finding a deficiency, the court told the jury how the government expert's testimony established the necessary tax deficiencies. The clear implication of these statements was that although necessary, the deficiencies in income tax could be presumed.

Petitioner contends that the court's last minute attempt to instruct on the necessary element was a useless and ineffective gesture since the clear and unequivocal thrust of the jury charge as a whole was the uncontested existence of the necessary tax deficiencies. It is clear that the government presented this case on a single issue theory. Moreover, it is equally clear that the trial judge also fell prey to the limited issue theme and instructed the jury accordingly. Petitioner submits that it is unmistakably clear that the jury understood its deliberations to be limited to the sole issue of willfulness. Any suggestion to the contrary is illusory when read in light of the record.

Petitioner recognizes that his trial counsel contributed to the confusion surrounding the issues at trial.^{*} However, petitioner urges this Court not to impute his trial counsel's errors to him. Petitioner believes that the trial court's failure to instruct on all essential elements of the alleged offense to be so funda-

^{*} On appeal, petitioner assigned as error the ineffective assistance of his trial counsel. Subsequent to the trial, petitioner discharged his trial counsel.

mental as to constitute plain error requiring reversal. *Screws v. United States*, 325 U.S. 91 (1945).

The government's allegations that petitioner conceded an essential element of the case and the sufficiency of the jury instruction is not supported by the record. The record does support petitioner's contention that he was denied the right to trial by jury due to the trial court's failure to charge on all essential elements of the charged offenses which resulted in a partial direction of the verdict against petitioner.

CONCLUSIONS

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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